Nos. 17-1717 & 18-18

# In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
*Petitioner,*

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
*Respondents.*

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MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *et al.*,
*Petitioner,*

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
*Respondents.*

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**Brief *Amici Curiae* of Veterans in Defense of Liberty, Billy Graham Evangelistic Association, Samaritan's Purse, Concerned Women for America, Congressional Prayer Caucus Foundation, International Conference of Evangelical Chaplain Endorsers, National Legal Foundation, and Pacific Justice Institute, *in support of Petitioners and urging reversal***

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## INTERESTS OF *AMICI CURIAE*[1]

**Veterans in Defense of Liberty** is a national advocacy group of veterans dedicated to restoring and sustaining the original moral and constitutional principles of our Republic. Members of Veterans in Defense of Liberty continue to serve with the same passion and dedication to our country as we did in combat. We continue to honor our sacred oath to support and defend the Constitution of the United States. And we act with a heightened sense of continued duty to ensure that the sacrifices of our brethren who did not come home were not made in vain.

When we raised our hands, we did not "solemnly swear," 10 U.S.C. § 502—a life-long pledge which still ends with, "So help me God"—to merely defend a piece of paper enshrined in our collective history. Rather we also pledged to defend the society and culture it has established and guided for 229 years. It doesn't matter if the topic is voter ID, immigration, national security, or religious liberty. They are all veterans' issues.

The **Billy Graham Evangelistic Association** ("BGEA") was founded by Billy Graham in 1950, and continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the

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[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square, to cultivate prayer, and to proclaim the Gospel. Thus, it is concerned whenever government acts to restrict and inhibit the free expression of the Christian faith those activities represent.

**Samaritan's Purse** is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs, and resources for children, all in the name of Jesus Christ. Samaritan's Purse's concern arises when government hostility prevents persons of faith from practicing core aspects of faith such as prayer, discipleship, evangelism, acts of charity for those in need, or other day-to-day activities of those practicing their sincerely held religious beliefs.

**Concerned Women for America** ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that

strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and wellbeing of every woman in America.

**The Congressional Prayer Caucus Foundation** (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-three states.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") has as its main function to support and represent independent evangelical churches and religious organizations that endorse chaplains to the military and other organizations requiring chaplains, avoiding the

entanglement with religion that the government would otherwise have if it determined which clergy could minister to religious military personnel. ICECE safeguards religious liberty for chaplains and all military personnel. A proper understanding of Religion Clauses of the First Amendment is essential to allow ICECE to achieve its purposes. Its chaplains proudly wear the Latin cross on their military uniforms.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Maryland, are vitally concerned with the outcome of this case because of its effect on the proper understanding of the Establishment Clause.

**The Pacific Justice Institute** (PJI) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area.

## SUMMARY OF ARGUMENT

The circuit courts of appeals, unlike this Court, continue to force the three-part test enunciated in *Lemon v. Kurtzman*[2] onto every Establishment Clause

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[2] 403 U.S. 602 (1971).

challenge, no matter the facts. This case, involving a monument to the fallen in the Great War that is fashioned in the shape of a cross, provides this Court with the opportunity to clarify that *Lemon* cannot always be squeezed to fit.

This Court has not applied *Lemon* in over a dozen years, looking instead to original public meaning and historical practice to determine what is a prohibited establishment of religion. Combined with a textual reading, this is the proper guiding principle for resolving Establishment Clause cases. Central to a proper understanding is that both the Establishment Clause and the Free Exercise Clause are *pro*-religion; the Establishment Clause is not hostile to religion and its exercise. The Establishment Clause is also pro-marketplace of ideas, recognizing that adults are able to observe, sift, and evaluate ideas without at the same time being forced to adopt them. The clause does not arm the non-religious with a heckler's veto.[3]

Although able to quote snippets from prior opinions

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[3] *See Pinette v. Cap. Square Review & Advisory Bd.*, 30 F.3d 675, 679 (6th Cir. 1994), *aff'd*, 515 U.S. 753 (1995) ("The freedoms guaranteed by the Constitution cannot depend upon the fanciful perceptions of some hypothetical dolt."); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) ("The plaintiffs posit a 'reasonable observer' who knows nothing about the nature of the exhibit—he simply sees the religious object in a prominent public place and ignorantly assumes that the government is endorsing it.").

of this Court, those who wish to push *Lemon* to its limits disregard that the Religion Clauses, by protecting religion from government interference and encouraging its exercise, fulfill an important *secular* purpose. The Founders well understood this, believing religion to be essential to preserve the social fabric of the new nation and to undergird the success of the representative democracy they were founding.

The Establishment Clause does not require the Bladensburg WWI memorial to have its cross-pieces sawn off.[4] Maintaining a memorial cross to symbolize the ultimate sacrifice of the war dead does not in any normal sense "establish" religion, either as the word was used in the Eighteenth Century or now. Moreover, crosses and other religious symbolism used by governments was not thought to be threatened either when the States adopted the First Amendment or when they themselves disestablished churches over the following decades.

This Court should reaffirm its recent pronouncements that text and history are central to a proper interpretation of the Establishment Clause, either rejecting the *Lemon* standard or correcting its overuse. It should recognize that the Religion Clauses work in tandem to encourage the exercise of religion because, as the Founders understood, religion is a necessary support for our system of government and, thus, serves an important secular purpose.

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[4] The panel majority below suggested this as a way to cure the memorial's presumed unconstitutionality. 874 F.3d 195, 212 n.19 (4th Cir. 2017).

## ARGUMENT

The court below, at the urging of American Humanist Association (AHA), adopted a theory of the Establishment Clause that outlaws any practice from which it could be reasonably construed that the government favors, or even recognizes, religion.[5] Under AHA's theory, the clause requires all government actions to be oblivious to religion and affirmatively resistant to any religious symbolism.

This theory of the Establishment Clause is inconsistent with its language, its history, and this Court's precedent. The Establishment Clause is not hostile to religion, but protective of it; it guards against the government's encroachment on religion, but not vice versa. Moreover, the motivating spirit of the Establishment Clause, like the rest of the First Amendment, is not parental, but, instead, recognizes that our citizenry is adult enough not to be swayed by every wind of doctrine.

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[5] Of course, government may not consistently with the Establishment Clause essentially turn over governmental functions to a religious body. *See Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (striking down state's making a religious community its own school district); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (striking down an ordinance creating a veto right for churches over the issuance of liquor licenses within a 500-foot radius).

## I. The Establishment Clause Is Pro-Religion and Does Not Prohibit All Laws and Practices Respecting Religion.

The First Amendment is pro-freedom of speech, pro-freedom of press, and pro-freedom of assembly. It accomplishes those purposes by providing that "Congress shall make no law . . . abridging" those freedoms. Similarly, the amendment's Religion Clauses are pro-religion, not hostile to it, when they prohibit Congress from establishing religion or restricting its free exercise.

As elaborated below, the Establishment Clause in particular safeguards religion by keeping government out of church doctrine and preventing the government from favoring one religion or sect over another. This protects minority sects from being marginalized, and it makes sure that citizens can define and practice their faith without fear of government interference. The clause enforces a one-way "wall" of separation, restraining government interference with religion and its practice; it was never intended to keep religion out of public life.[6]

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[6] In *Lemon*, the Court remarked that the Establishment Clause's "line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S. at 614. Better stated, the separation is a one-way barrier similar to the tire-puncture strip commonly embedded in car rental lots—it allows travel one way, but not in reverse.

### A. The Text of the Clause Allows Laws and Practices About Religion, Other Than Those Establishing Religion.

Canvassing AHA's arguments, one would think that the Establishment Clause read that "Congress shall make no law respecting [ ] religion." But the clause does not read as AHA would have it. It reads that "Congress shall make no law respecting *an establishment of* religion."[7] It obviously does not prohibit any legislation dealing with or mentioning religions or their organizations or adherents. If it did, the Constitution would be inconsistent with itself, as the next phrase of the First Amendment deals with the "free exercise" of religion, and the Constitution prohibits a religious test for officeholders[8] and thrice allows affirmation instead of oaths to accommodate Quakers and others who had religious objections to oaths, all of which provisions are laws "respecting religion," but not its establishment.[9] Nor does prohibiting the establishment of religion have any obvious application to the use or maintenance of commonly understood symbolism with religious roots to honor those slain in service of our country.

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[7] U.S. Const. amend. I (emphasis added).

[8] *Id.* art. VI, cl. 3.

[9] *Id.* art. I, § 3, cl. 6; art. II, § 1, cl. 8; art. VI, cl. 3. *See generally* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 593-96 (hereinafter, "Esbeck, *Uses and Abuses*").

### B. The Founders Passed Laws and Engaged in Practices Encouraging Religion.

The Founders showed by their conduct that the Establishment Clause did not prohibit them from enacting laws and engaging in governmental practices that encouraged religion and religious activity.[10] For example,

- as noted by the Court in *Marsh v. Chambers* [11] and *Town of Greece v. Galloway*,[12] the First Congress paid for a chaplain, a tradition that has continued uninterrupted to this day;

- President Washington issued the first Thanksgiving Proclamation, a practice that has been continued by presidents to this day;[13]

- Congress approved use of the Capitol

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[10] *See generally* Esbeck, *Uses and Abuses* at 615-20; Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 23-24, 53-55 (1982).

[11] 463 U.S. 783, 787-88 (1983).

[12] 134 S. Ct. 1811, 1818 (2014).

[13] *See* George Washington, Proclamation: A National Thanksgiving (Oct. 3, 1789), http://press-pubs.uchicago.edu/founders/documents/amendI_religions54.html (last visited Dec. 11, 2018).

building for regular church services;[14] and

- the Founders openly considered religious symbolism for our country's Great Seal, ultimately adopting the eye of "Providence" atop a pyramid (alluding to the Hebrews' deliverance from Egypt and representing the Trinity) and a motto, *Annuit Coeptis*, meaning, "He (God) has favored our undertakings."[15]

Why would the Founders officially support the practice of religion by themselves and other citizens? The simple answer is that the Founders understood that religious beliefs and ethical principles provided a foundation for, and helped the preservation of, the type of government that they had set up in the Constitution. In this way, these enactments and practices served a critical, *secular*, governmental purpose.

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[14] 1 Debates and Proceedings 797, 6th Cong., 1st Sess. (Dec. 4, 1800).

[15] U.S. Dep't of State Bureau of Pub. Affairs, *The Great Seal of the United States* 4, 6, 15 (2003), https://www.state.gov/documents/organization/27807.pdf (last visited Dec. 10, 2018). The Continental Congress in 1776 appointed a committee of Franklin, Jefferson, and Adams to propose the seal's design. Both Jefferson and Franklin proposed biblical themes related to the people of Israel's deliverance from Egypt. *See id.* at 2; Richard S. Patterson & Richardson Dougall, *The Eagle and the Shield: A History of the Great Seal of the United States Government* 12-13,16 (1976).

Many of the Founders articulated this,[16] perhaps most famously President Washington in his Farewell Address:

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. . . . Let it simply be asked where is the security for prosperity, for reputation, for Life, if the sense of religious obligation *desert* the oaths, which are the instruments in the Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[17]

President John Adams made the same point in his address to the Massachusetts Militia in 1798:

> We have no government armed with power capable of contending with human passions unbridled by

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[16] *See generally* Esbeck, *Uses and Abuses* at 615; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1431; Michael W. McConnell, *Establishment and Disestablishment at the Founding*, 44 Wm. & Mary L. Rev. 2105 (2003).

[17] 1 *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 220 (James D. Richardson, ed., 1899).

> morality and religion. Avarice, ambition, revenge, or gallantry [sexual licentiousness], would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made for a moral and religious people. It is wholly inadequate to the government of any other.[18]

The positive influence of religion on society and our system of government, as noted repeatedly by the Founders, has not been eroded by time.[19] As discussed further below, it continues to this day.

### C. The States When They Disestablished Did Not Eliminate Their Uses of Religious Symbolism.

Another proof that, historically, *establishment* was not understood to include government's use of religious symbolism is provided by the States that adopted the First Amendment. Over the next several

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[18] https://founders.archives.gov/documents/Adams/99-02-02-3102 (last visited Mar. 28, 2018); *see also Van Orden v. Perry*, 545 U.S. 677, 727-28 n.29 (2005) (Stevens, J., dissenting, quoting Justice Story: "Christianity is indispensable to the true interests and solid foundations of all free governments.").

[19] *See generally* Steven W. Fitschen, *Religion in the Public Schools After* Santa Fe Independent School District v. Doe: *Time for a New Strategy*, 9 Wm. & Mary Bill of Rts. J. 433, 446-49 (2001) (noting that the Framers distinguished between acknowledgment, accommodation, encouragement, and establishment of religion and only the last was forbidden).

decades, most of those States disestablished their own churches. If AHA's interpretation of *establishment* were correct, when the States disestablished, they also would have purged all their religious symbolism and references in governmental flags and seals and mottos.[20] But the reverse is true.

Maryland disestablished in 1810,[21] but both its flag and its seal boast two large crosses, then as now.[22] After Connecticut disestablished by means of its Constitution of 1818,[23] it took no steps to change its state motto, *Qui Transtulit Sustinet*, meaning, "He [God] Who Transplanted Still Sustains." This motto still adorns Connecticut's Great Seal, along with

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[20] Currently pending before the Third Circuit is a strict separationist organization's challenge to religious symbolism in a Pennsylvania county's seal. *Freedom from Religion Foundation v. County of Lehigh*, No. 17-3581 (3d Cir.).

[21] *See generally* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1484-91.

[22] *See Maryland at a Glance, Maryland Manual On-Line*, https://msa.maryland.gov/msa/mdmanual/01glance/html/symbols/seal.html (last visited Dec. 10, 2018). Maryland has also retained its state motto taken from the Vulgate version of the Bible, "With favor wilt [God] compass us as with a shield" (Psalm 5:12). *Id.*

[23] *See* https://connecticuthistory.org/the-constitution-of-1818-background/ (last visited Dec. 13, 2018).

representations of three grapevines, the likely source of reference for both of which is Psalm 80:8: "Thou hast brought a vine out of Egypt: thou hast cast out the heathen, and planted it" (KJV).[24]

Rhode Island is the model of non-establishment, with Charles II granting that freedom to the colony in its original charter of 1663.[25] However, since 1664, Rhode Island has had emblazoned both an anchor and the word *Hope* on its flag and seal. This hearkens back to the belief of its principal founder, Baptist non-conformist Roger Williams, that hope in God's promises is an "anchor of the soul," as Hebrews 6:19 attests.[26] Rhode Island has not only retained this religious symbolism on its flag and seal until the present day; it also has never renamed its capital city,

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[24] *See* https://portal.ct.gov/about/state-symbols/the-state-motto (last visited Dec. 13, 2018).

[25] Charles II granted Rhode Island its charter in 1663 that provided its citizenry freedom of religious practice with n o established church. http://sos.ri.gov/assets/downloads/do cuments/RI-Charter-annotated.pdf. (last visited Dec. 11, 2 018). Rhode Island adopted a constitution in 1843 with a f reedom of religion clause forbidding a person being compel led to attend or support "any religious worship, place, or m inistry whatever . . . ." R.I. Const. art I, §3.

[26]In the King James (Authorized) Version, Hebrews 6:19-20 reads as follows: "Which hope we have as an anchor of the soul, both sure and stedfast, and which entereth into that within the veil; Whither the forerunner is for us entered, even Jesus, made an high priest for ever after the order of Melchisedec."

Providence.

No evidence has been brought forward to suggest that, upon disestablishment, Maryland, Connecticut, Rhode Island, or any other State terminated its erection or maintenance of memorials using the cross or other religious symbolism. This further illustrates that such uses do not "establish" a religion as the term is used in the First Amendment.

### D. This Court's Precedent Does Not Contradict the Establishment Clause's Text and History.

AHA and other "strict separationists"[27] use as their working proposition that any law or practice that demonstrates "religious favoritism" violates the Establishment Clause.[28] While some language from *Lemon* and, in particular, *Everson v. Board of Education*,[29] taken out of context, would seem to support that view, it is an overreading of those cases and inconsistent with text, history, and other precedent of the clause.

*Everson* contains the unfortunate phrase on which

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[27] They are more appropriately dubbed "double separationists," as all understand the Establishment Clause to require a strict separation of the State from interference with religion.

[28] *See, e.g.*, *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1095, 1102 (W.D. Wis. 2017), *appeal pending* Nos. 18-1277 *et al.* (7th Cir.).

[29] 330 U.S. 1 (1947).

AHA and other strict separationists have built their arguments: that the Establishment Clause prohibits "laws which aid one religion, aid religions, or prefer one religion over another."[30] Obviously, neither the text of the clause itself nor its history prohibit a law that aids all religions in a nondiscriminatory way, or the Free Exercise Clause would violate the Establishment Clause.[31] What is ignored is that this language in *Everson* was *dicta*, as the Court in that case upheld New Jersey's providing direct aid for transporting students to private religious schools.[32] This has been reinforced in multiple other cases with similar fact patterns, including *Mitchell v. Helms*,[33] in which the Court in 2000 upheld a state's lending educational materials to both public and private schools, including religious ones; *Zelman v. Simmons-Harris*, [34] in which the Court in 2002 validated government vouchers for parents who could use them for education in sectarian schools; *Zobrest v. Catalina Foothills School District*,[35] in which the Court in 1993 ruled that a state could provide an interpreter for a deaf student who elected to attend a religious school; *Witters v. Washington Department of Services for the*

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[30] *Id.* at 15.

[31] *See* Esbeck, *Uses and Abuses* at 601-12 (explaining the linguistic and practical impossibility that the Religion Clause are in tension with each other).

[32] 330 U.S. at 17-18.

[33] 530 U.S. 793 (2000).

[34] 536 U.S. 639 (2002).

[35] 509 U.S. 1 (1993).

*Blind*,[36] in which the Court in 1986 validated government funding of assistance services for a blind student at theological school; and, most recently, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[37] in which the Court in 2016 forbade the disqualification of a church from a governmental grant simply due to its religious character.

This Court has made clear in these and other decisions that the Establishment Clause does not dictate hostility to religion or religion's place in our common life. In *Zorach v. Clauson*, it elaborated,

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. . . . To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against

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[36] 474 U.S. 481 (1986).

[37] 137 S. Ct. 2012 (2016).

efforts to widen the effective scope of religious influence.[38]

Strict separationists have argued, in situation after situation, that *Lemon* and its threefold test supersede all this other precedent. But trying to use *Lemon* as a one-size-fits-all test has been almost uniformly criticized, including by members of this Court, and this Court has refused to apply it in Establishment Clause cases for over a decade and counting,[39] implicitly recognizing its inapplicability in

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[38] 343 U.S. 306, 313-14 (1952); *see also Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948) ("A manifestation of [governmental hostility to religion or religious teachings] would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."); *Epperson v. Ark.*, 393 U.S. 97, 103-04 (1968); *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (noting "an unbroken history of official acknowledgment . . . of the role of religion in American life"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring) ("indifference to 'religion in general' is not what our cases, both old and recent, demand").

[39] *E.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) (describing the *Lemon* test as "discredited"); *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring) ). The Supreme Court's last substantive discussions of *Lemon* were in *Van Orden*, 545 U.S. at 685-86, in which the plurality opinion of Chief Justice Rehnquist noted that, within two years of its announcement, the tri-part test was being described as "no more than helpful sign posts" (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)) and finding it "not useful" in the

many situations.

The *Lemon* test is to review (1) whether the law has a secular purpose, (2) whether its primary effect advances or inhibits religion, or (3) whether it fosters an excessive entanglement with religion.[40] The strict separationist view espoused by AHA and the panel majority below unhooks this test from the overarching purpose of the Establishment Clause —that being to prevent the government from interfering with religious institutions and their doctrines. It ignores the salutary, secular benefits to society that religious organizations and the practice of religion provide, benefits the Founders did not prohibit, but understood and welcomed.

These benefits have continued throughout our country's history and are as simple to understand as the Golden Rule: "Do unto others as you would have them do unto you." Religions inculcate their adherents not to look primarily to their own, individual interests, but to those of others. It is no accident, therefore, that religious principles and motivations have fueled the great social advances of our country, from the abolition of slavery in the 1800s, to provision of voting rights for women in the early 1900s, to protection of civil rights in the latter half of the Twentieth Century. Religious beliefs of those active in those causes bonded together people of different races, incomes, and ethnicity in a shared purpose for the common good of

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particular case before the Court; and in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 859-60 (2005), which described the test as "a common, but seldom dispositive, element of our cases."

[40] 403 U.S. at 612-13.

justice for all, even though it might, as an individual matter, dilute their heretofore privileged place in society or deplete their savings. Of course, it is religion that motivates many individuals to donate both time and money to improve the plight of their fellow citizens and immigrants in hospitals, prisons, detention centers, and slums, relieving the public at large from these obligations.[41] The Establishment Clause, properly understood, does not require a court to ignore that religion is a powerful social force that motivates individuals to put the common good before their own interests. This motivation serves important secular goals.

*Amicus* Samaritan's Purse, as a representative example, illustrates the essential and positive impact that churches and religious organizations have on their communities in areas that otherwise would be the responsibility of the government to ameliorate or would go unaddressed. Motivated by Jesus' well-known parable, Samaritan's Purse operates worldwide to be a "Good Samaritan" to help those in material need "wherever we find them." In this country in 2018, it assisted those who had lost homes and possessions by wildfires in the West and by Hurricanes Florence and Michael in the South.[42]

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[41] *See generally* James A. Davids, *Putting Faith in Prison Programs, and Its Constitutionality Under Thomas Jefferson's Faith-Based Initiative*, 6 Ave Maria L. Rev. 341 (2008) (discussing faith-based initiatives to support and rehabilitate prisoners and analogous historical examples).

[42] *See* https://www.samaritanspurse.org (last visited Dec. 8, 2018).

Samaritan's Purse also sponsors, among other ministries, "Operation Heal Our Patriots," providing wounded veterans and their spouses physical, emotional, and familial support.[43] This is relief that otherwise would have fallen on federal, state, and local governments to provide.

A 2016 study[44] presented findings that monetized the annual contribution of religion to the socio-economic well-being of the country. Its authors noted that these contributions "range from the basic economic drivers of any business—staff, overhead, utilities—to billions spent on philanthropic programs, educational institutions and health care services." The study resulted in a conservative estimate of $378 *billion* annually (based only on revenues of faith-based organizations).[45] The authors suggest that a more realistic estimate, which includes the fair market value of goods and services provided by religious organizations and businesses with religious roots, is in excess of $1 *trillion* annually.

In this study, the authors also present data[46] on

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[43] *Id.*

[44] Brian J. and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisciplinary J. of Research on Rel., art. 3 (2016), available at http://www.religjournal.com/pdf/ijrr12003.pdf (last visited Mar. 28, 2018).

[45] The authors note, "By way of economic perspective, this is more than the *global* annual revenues of tech giants Apple and Microsoft *combined*." *Id.* at 2.

[46] *Id.* at 16-19, table 11.

the types of social issues addressed by religious congregations and the number of programs that religious congregations conduct to address them. They include parenting assistance, alcohol/drug abuse recovery, marriage improvement, unemployment assistance, veteran and veteran family support, mental illness care, food for the poor, home building and repair, race relations, voter registration, support to immigrants, HIV/AIDS prevention, environmental education, disaster relief, visitation of shut-ins and the incarcerated, and many more.

By whatever metric, religious organizations and other faith-based enterprises in the United States have a profoundly positive impact on society, which makes the task of governing easier and more effective. This Court should affirm that *Lemon* should not be read to require blinders to the important secular benefits provided by religion. If applied correctly, that test can put the focus directly in line with the historical purpose of the Establishment Clause to prevent the government from dictating to religious denominations and not discriminating between them. *Lemon* must either be read in harmony with the rulings of this Court recited earlier and with *Corporation of the Presiding Bishop v. Amos*[47]—in which the Court held that the Establishment Clause does *not* require government to be hostile, or even indifferent, to religion, but only stops the government from acting "with the intent of promoting a particular point of view in religious matters"[48]—or be overruled.

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[47] 483 U.S. 327 (1987).

[48] *Id.* at 335.

In summary, this Court's Establishment Clause decisions require governments to be neither antagonistic nor agnostic toward religion. As our country's history demonstrates, from its founding to the present, religious organizations and individuals serve important public purposes that help us bind together and assist the most needy among us when, otherwise, the State would have to step in and do so or leave those needs unaddressed. The Establishment Clause as interpreted by this Court recognizes that religion in unique ways serves these important secular interests and protects religion from the interference of the State in accomplishing those purposes, while allowing the State to help facilitate this practical exercise of religion in a non-preferential way and to acknowledge the important place of religion in its history and to its citizenry to the current day. Properly understood, the "wall of separation" of the Religion Clauses is a one-way barrier, preventing the State from interfering with how religious adherents, and those motivated by morality taught by religions, fulfill their missions, while allowing the salubrious flow of religion to enrich, preserve, and protect the State and its inhabitants.

## II. The Establishment Clause Is Pro-Marketplace of Ideas

Another error of interpretation by the AHA and other strict separationists is that they magnify the alleged dangers of acknowledgement of religion in the public sphere. It seems that, if they had their way, they would not only crush every crèche on public lands, but also would uproot every cross and deface every Star of David maintained by the Arlington National

Cemetery.[49] The underlying assumption is that our country's citizenry is so thin-skinned and adolescent that any recognition of religion in a public place, by either symbolic or explicit speech, will be of such force as to coerce the recipient to accept all the precepts of that religion. As a result, any such existing speech must be extirpated, any such future speech, banned.

This underlying assumption of the strict separationists is antithetical to that of the First Amendment. The Founders believed that adults were not will-of-the-wisps, but rational beings who could sift through competing truth claims for themselves. Thus, the Founders and the States established, as part of our nation's organic law, an open marketplace of ideas, making sure that the government could not

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[49] *See American Humanist Ass'n v. Md.-Nat'l Cap. Park and Planning Comm'n*, 891 F.3d 117, 123 (4th Cir. 2018) (Niemayer, J., dissenting from denial of rehearing en banc). In addition to the tombstones for individuals, during 1920 and 1921 the remains of about 2,100 United States servicemen initially buried in France were disinterred and reburied at Arlington National Cemetery. The "Argonne Cross" commemorates them with the inscription on the base, "In memory of our men in France, 1917-1918." https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials (last visited Dec. 8, 2018). The "Canadian Cross" at Arlington memorializes those of our war dead in WWI who served in the Canadian Armed Forces. The monument is a 24-foot, granite, Latin cross adorned by a bronze sword; it was dedicated on Armistice Day 1927. It has since been inscribed with memorial statements for those who served and died in World War II and in the Korean War. *Id.*

dictate what people, including in the press, said, or with whom they assembled. In the same manner, they prohibited the government from interfering with the private practice and belief systems of religion or from taking sides in any such discussion.

This Court has frequently sounded this theme. While recognizing that greater care must be taken with children and adolescents who are not yet ready for full participation in the marketplace of ideas and may more naturally associate speech in school with government-endorsed speech,[50] in adult situations, the Court has repeatedly provided that the First Amendment protections work together to require access to the public marketplace of all ideas, including religious ones.[51] Indeed, this Court has underscored that religious speech cannot be discriminated against

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[50] *See Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *McCollum*, 333 U.S. at 210-11. All these decisions also involved determining whether the speech involved was private, voluntary speech (which does not involve the Establishment Clause) or was so closely controlled and associated with the government as to be considered government speech (which does). *See, e.g., Santa Fe*, 530 U.S. at 302.

[51] *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (Establishment Clause does not forbid, and the Free Speech Clause requires, equal access for religious club in elementary school); *Widmar v. Vincent*, 454 U.S. 263 (1981) (same for religious speech in public university setting).

when government benefits are provided.[52]

This is dramatized by the fact that, since before the Constitution until the present, our military services have also displayed religious symbolism on their uniforms. Christian chaplains, including those represented by *amicus* International Conference of Evangelical Chaplain Endorsers, wear Latin crosses; Jewish, the tablets of the Ten Commandments topped by a star of David; Muslim, the crescent; and Buddhist, the wheel of dharma.[53] The recruitment and payment of chaplains by the military involves a special situation, but it also demonstrates that the Religion Clauses work in tandem, rather than in conflict, to encourage religion and its exercise by its citizenry.[54]

## III. These Foundational Principles Demonstrate the Constitutionality of the Bladensburg Cross Memorial.

Applying the text and history of the Religion

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[52] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that the Establishment Clause did not forbid, and the Free Speech Clause required, a student religious newspaper equal access to a limited public forum supported by a university subsidy); *see also Trinity Lutheran Church of Colum., Inc. v. Comer*, 137 S. Ct. 2012 (2016) (finding unconstitutional the State's refusal to grant a benefit solely because of the organization's religious character).

[53] *See generally* https://en.wikipedia.org/wiki/Religious_symbolism_in_the_United_States_military (last visited Dec. 10, 2018). Early on, the Christian symbol of a shepherd's staff was also used. *Id.*

[54] *See Katkoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).

Clauses confirm that a government war memorial fashioned in the shape of a cross is not a prohibited establishment. Nor must the cross be neutralized by addition or subtraction to make it constitutional.

### A. Cross Memorials Are Constitutional.

The central facts of this case are not in dispute and are representative of those for other memorials: the Bladensburg Cross has stood for close to a century and for years has been passed by thousands of motorists a day; it was erected as a memorial to the citizens of Prince George's County, irrespective of religious persuasion, who lost their lives in military service during World War I; the dominant religion at the time was Christianity (and still is); the Latin or Celtic cross is both a symbol of the specific, sacrificial death of Jesus Christ and, more generally, of sacrificial service; and similar memorial crosses were erected, not only in this country, but throughout the world (e.g., at various WWI cemeteries and memorials for the Battles of the Somme and Verdun in France).[55]

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[55] The sacrifice of thousands of soldiers in the WWI battles of the Somme and Verdun are commemorated today by cemeteries and monuments throughout those battlefields. Many monuments include a cross or reference to Biblical passages (e.g., The Kings Royal Rifle Corps Memorial at Pozières in the shape of a cross and the Memorial to the 102nd and 103rd Tyneside Infantry Brigades at La Boiselle that includes Jesus' words from John 15:13, "Greater love hath no man than this that he lay down his life for his friend."https://en.wikipedia.org/wiki/List_of_World_War_I_memorials_and_cemeteries_in_the_Somme (last visited

Using passive symbols that have their origins in religion is not an "establishment" of religion as first publicly understood.[56] Such symbols do not dictate doctrine or governance or require attendance at services. Moreover, no one could reasonably believe that, by viewing the memorial, they were being forced to convert to Christianity specifically or theism generally or being made to suffer any inducement to do so. The panel majority rightly held that using public funds to maintain the monument has a secular purpose of supporting a memorial for the county's war dead.[57] ) But the panel majority was clearly wrong when it determined that maintaining a war memorial that uses symbolism most readily known to the

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Dec. 12, 2018)). Another monument at the Verdun battlefield, Memorial to the Muslim Soldiers, evokes a mosque. https://www.tracesofwar.com/sights/43121/Memorial-to-the-Muslim-Soldiers.htm (last visited Dec. 12, 2018). Although located outside our country, they nevertheless demonstrate the widely practiced and accepted use of religious symbols in public places to honor those who sacrificed and died serving their country and protecting freedom from tyranny.

[56] Establishment was defined in the first dictionary of American English as "the act of establishing, founding, ratifying or ordaining," such as in "[t]he episcopal form of religion, so called, in England." Noah Webster, *Am. Dict. of the English Language* (1st ed. 1828), http://websterdictionary1828.com/Dictionary/establishment (last visited Dec. 11, 2018).

[57] 874 F.3d at 206.

majority of its citizenry for sacrifice places Christianity "above" other faith.[58] It simply recognizes the cross's dominance as a recognized symbol of personal sacrifice. As Justice Kennedy wrote in the plurality opinion in *Salazar v. Buono*,[59]

> The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. . . . [A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

Professor Michael McConnell identifies six characteristics of the Church of England's establishment in England and the colonies that formed the backdrop for the Establishment Clause: (1) governmental control over the doctrines, structure, and personnel of the state church; (2) mandatory attendance at religious worship services in the state church; (3) public financial support of the state church; (4) prohibition of religious worship in other

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[58] *Id.* at 208-11.

[59] 559 U.S. 700, 718-19 (2000) (Kennedy, J., plurality op.).

denominations; (5) use of the state church for civil functions; (6) and limitation of political participation to members of the state church.[60] Similarly, Professor John Witte relates,

> [T]he founders understood the *establishment* of religion to mean the actions of government to "settle," "fix," "define," "ordain," "enact," or "set up" the religion of the community—its religious doctrines and liturgies, its religious texts and traditions, its clergy and property. The most notorious example of this, to their minds, was the establishment by law of Anglicanism. English ecclesiastical law . . . led to all manner of state controls of the internal affairs of the established Church, and all manner of state repression and coercion of religious dissenters.[61]

None of these features targeted by the Establishment Clause are present in memorials using commonly understood religious symbolism.

### B. The Establishment Clause Does Not Require the Watering Down of Religious Expression.

The panel majority, relying on the fact that many

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[60] Michael W. McConnell, *Establishment and Disestablishment at the Founding*, 44 Wm. & Mary L. Rev. 2105, 2131, 2144, 2146, 2159, 2169, 2176 (2003).

[61] John Witte Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition*, 186 (2006).

who supported the fundraising for the cross gave voice to the existence of a sovereign deity (like the Founding Fathers did in the Declaration of Independence[62]), suggests that the cross might pass constitutional muster if its cross-pieces are sawn off or if it were in a close grouping of other memorials that had symbols that were specific to Judaism and Islam (and how many other religions and non-religions is left undisclosed). This is not a proper understanding of the Establishment Clause.

The Religion Clauses protect the free exercise of religion by individuals and prohibit the government from dictating the content of religion. Thus, the government cannot properly mandate the substance of its expression. This Court recognized this in *Town of Greece* when it sustained local legislative sessions being opened in prayer, even when participants prayed "in Jesus' name."[63] As the Court stated, "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy."[64]

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[62] The Declaration of Independence relies on rights granted by "Nature's God" and the "Creator" and "appeal[s] to the Supreme Judge of the world . . . with a firm reliance on the protection of Divine Providence," with the signers pledging to each other "our sacred Honor." www.ushistory.org/declaration/document (last visited Nov. 6, 2018).

[63] 134 S. Ct. at 1816.

[64] *Id.* at 1822. The Court elaborated in the analogous context of legislative prayer, "The contention that

Nor does the use of a monument that exhibits religious symbolism have to be watered down by including a number of other types of monuments or religious symbols. No one need shy away from the fact that a cross is a fitting symbol of sacrifice because it has a historical foundation in the death of Jesus. That might give the memorial a deeper or broader significance for many, but that is because of personal beliefs, not governmental importuning. That significance need not be "diluted" for the memorial to be constitutional. The Establishment Clause prohibits enforcement of a civic religion; it does not require it or regulate its content when it is permissible in the public square.[65]

## CONCLUSION

Memorials fashioned in the shape of a cross honoring our country's war dead do not violate the Establishment Clause. This is clear from the clause's text, history, and precedent. The decision of the Fourth Circuit should be reversed.

Respectfully submitted,
this 26th day of December 2018,

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legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny* [*v. ACLU*], 492 U.S. 573 [(1989)], that was disputed when written and has been repudiated by later cases." *Id.* at 1821.

[65] *Id.* at 1821-22.

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